



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL SUIT NO. 24 OF 2021**

**FORMERLY ELC NO.798 OF 2012 AND FORMERLY H.C.C.C NO. 40 OF 2011**

**DAVID LIMO BUNDOTICH.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**HOUSING FINANCE COMPANY OF KENYA LIMITED....DEFENDANT/RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**M/S Kalya & CO. Advocates for the respondent**

**M/S Wambua Kigamwa & CO. Advocates for the plaintiff**

**R U L I N G**

1. The plaintiff, David Limo Bundotich, primarily seeks to enjoin Joseph Gikonyo T/A Garam Investments and Kipkoech Rutto as 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively, to amend the plaint to reflect the said changes and plead additional facts and injunctive reliefs against the defendants from evicting him from the land parcel known as UASIN GISHU/KIMUMU/629 and or interfering with his tenants and other persons that he has placed into the occupation of the land.
2. In support of the application, the plaintiff/applicant relied on the grounds deposed in his affidavit dated 13/4/21 wherein he argued that the joinder of additional parties was necessary to determine the real issues in controversy with finality and further, that the amendments to the pleadings were necessary in order to rectify the name of the defendant, plead additional facts and add the proposed new parties to the suit. In addition, the applicant contended that the 3<sup>rd</sup> proposed defendant intends to unlawfully take over the possession of the suit land from the plaintiff hence it is necessary for court to grant him the injunctive orders sought. Finally, the applicant was of the view that no prejudice will attend the current defendant and that he has a prima-facie case with a probability of success and that damages shall not constitute adequate remedy.
3. The application was vehemently opposed by the respondent through its replying affidavit sworn on the 11<sup>th</sup> of November 2021 by Oliver Kirior, a branch manager of the respondent. In particular, the respondent contended that the applicant's equity of redemption became extinguished upon sale of the suit property on exercise of statutory power of sale in 2012 thus the applicant has no prima-facie case. Secondly, the respondent averred that the application does not comply with the provisions of Order 8 rule 3 and 5 of the Civil Procedure Act and that the proposed amendments seek to introduce a new cause of action and bring unnecessary parties to the suit. In any case, the respondent was of the view that the application has been brought late in the day and is an afterthought considering that the land had been sold in 2012 to the 3<sup>rd</sup> proposed defendant.
4. Third, the respondent deposed that the plaintiff has no proprietary interest in the suit land hence cannot be granted the injunctive reliefs he seeks as the suit land ownership passed to the purchaser, the 3<sup>rd</sup> proposed defendant at the fall of the hammer in 2012. In any case, the respondent opined that if there is any right accrued to the plaintiff/applicant, the same can be settled by way of damages. The respondent thus urged court to find that the application having been brought after a delay of 10 years lacks merit and ought to be dismissed with costs.
5. The application was canvassed by way of written submissions and parties filed their respective submissions on the 18<sup>th</sup> of November for the plaintiff/applicant and the 22<sup>nd</sup> of November 2021 for the respondent.

## Determination

6. Having considered the parties pleadings, supporting documents and submissions, I find that two issues arise for determination, namely:

- a. Whether the Plaintiff/applicant's equity of redemption has been extinguished and if not,
- b. Whether the plaintiff has met the threshold for grant of the orders sought.

### a. Whether the Plaintiff/Applicant's Equity of Redemption has been extinguished

7. The respondent submitted that the plaintiff's equity of redemption extinguished once the respondent exercised its statutory power of sale and sold the property to the proposed 3<sup>rd</sup> defendant and executed the transfer in his favour. In fact, the respondent observed that in the process of generating the title deed, they noticed that the plaintiff/applicant herein had registered a court order dated the 23/3/2012 against the suit property. In return, the defendant filed an application dated the 22<sup>nd</sup> of July 2014 for the deregistration of the court order against the suit land which they submitted was allowed by this court on the 26<sup>th</sup> of July 2018.

8. The plaintiff/applicant did not address this issue but only submitted that he is in occupation of the said land together with tenants and that the 3<sup>rd</sup> proposed defendant intends to evict him from the suit property without strictly following the provisions of the law and in particular Sections 152B, 152E (1) and 152(2) of the Land Act 2012.

## THE LAW

9. There is a clear distinction between the legal right to redeem and the equitable right to redeem.

10. The legal right to redeem is the right specifically reserved to the mortgagor in the mortgage contract to recover his or her property upon discharging the obligations which the mortgage was created in order to secure. At law, the contract is construed strictly so that a mortgagor exercising his legal right to redeem must comply punctiliously with the proviso for redemption. See *Solomon Mbili Ngomo v Kenya Deposit Insurance Corporation Dalali Traders [2019] eKLR*. Thus, a mortgage to secure a money loan ordinarily fixes a definite date for repayment and at law, repayment must be made precisely on that date. Before the stipulated date, the mortgagor has no right to redeem either at law or in equity nor has the mortgagee, in the absence of a special agreement to that effect, the right to call in his money. See *Cousins, The Law of Mortgages, Sweet & Maxwell, 2<sup>nd</sup> Edition, 2001 at 359-361*.

11. The equitable right to redeem on the other hand, is the right of a mortgagor to recover his security by discharging his obligations under the mortgage despite the time fixed by the contract for the performance of those obligations passing and even though under the express terms of the agreement, the security may be stated to be the absolute property of the mortgagee. Similarly, in the case of a charge, it is the right to have the security freed from the charge although default was made at the time fixed by the contract for the performance of the obligations in respect of which the charge was given. See *Cousins (Supra) at 360*.

12. The right to redeem in equity is therefore a right given in contradiction to the declared terms of the contract between the parties and is thus the right to recover the mortgaged property after the expiry of the legal right to redeem through its non-exercise on the contract date. That is, after the passing of the contract date, equity superimposes on the mortgage agreement a condition giving the mortgagor a continuing right to redeem which he may exercise at any time before the right is destroyed by foreclosure, sale, release or lapse of time.

13. As rightly held by court in *Isaiah Nyabuti Onchonga v Housing Finance Company of Kenya Ltd & another [2020] eKLR*, this equitable right is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem and on his fully performing his obligations under the mortgage.

14. In Kenya and specifically under **Section 88 of the Land Act 2012**, a chargor undertakes to pay the principal money and interest on the days specified under the contract. The contract between the parties will describe the types of default that will invoke the statutory power of sale. The main type of default that may lead the chargee to execute the power of sale is the failure to pay owed sums under the contract.

15. However, the statutory power of sale is not a bare power. There are limits, rules, and procedures that apply to it as prescribed by the Land Act 2012.

16. The chargor has a right to exercise their equity of redemption once the chargor has defaulted. However, the default by the chargor does not give an automatic right to the chargee to sell the land or to enter into possession of it (**Section 88, Land Act 2012**). The equity of redemption remains in force until the chargee complies with the procedure under the Land Act 2012 as was observed by court in *Solomon Mbili Ngomo v Kenya Deposit Insurance Corporation Dalali Traders (supra)*.

17. The Equity of Redemption comes to an end when a valid contract of sale is executed or at the fall of the auctioneer's hammer. The property passes to the purchaser even though some other conveyancing formalities are yet to be completed. See *Nancy Kahoya Amadiva v Expert Credit Limited & Another [2015] eKLR*.

18. In Kenya, the chargee can exercise the statutory power of sale by following the procedure under the Land Act 2012 once chargor has defaulted as was held in *Isaiah Nyabuti Onchonga v Housing Finance Company of Kenya Ltd & another (supra)*. The Land Act, requires that certain procedures be followed prior to statutory power of sale. In essence, there are essentially three notices to be issued before exercising the statutory power of sale. These notices include; The Statutory Notice Under Section 90 of the Land Act and the Notice to sell under Section 96 (2) of the Land Act and the Redemption Notice under Rule 15 (b) of the Auctioneers Rules, 1997.

19. The application of the notice to sell under Section 96 (2) of the Land Act and the redemption notice under Rule 15 (b) of the Auctioneers Rules has slowly and steadily attracted attention from judges and practitioners and is thus important to address the nature of the requirement under Section 96 (2) of the Land Act and Rule 15 (b) of the Auctioneers Rules and the effect of non-compliance thereto.

20. **Section 96 (2) of the Land Act** brings to the fore a notice to sell of at least forty days while Rule 15 of the Auctioneers Rules describes a redemption notice of at least 45 days. The redemption notice is in line with **Section 89 of the Land Act** on the equity of redemption. At the same time the notice under Section 96 (2) gives the chargor at least 40 days to remedy the default or else the Chargee will proceed to sale.

21. It has been argued time and again that the requirements under Rule 15 of the Auctioneers Rules, 1997 are sufficient for purposes of Section 96 (2) of the Land Act. It has also been argued that the redemption notice by the Auctioneers can also serve as a notice to sell by the chargee as envisaged by Section 96 (2) of the Land Act because it is issued by an agent of the Chargee duly acting on instructions and also informs the chargor that the property will be sold after 45 days unless he/she redeems it.

22. However, the two notices serve distinct purposes and are served by different persons. This was canvassed by Gikonyo J in *Albert Mario Cordeiro & Another vs Vishram Shamji [2015] eKLR* as follows:

**“Some arguments I have encountered seem to suggest a Notice of Redemption under Rule 15 of the Auctioneers Act is sufficient for purposes of Section 96(2) of the Land Act. I think, there is clear legal bifurcation between these two laws and any attempt to fuse the two only increases the confusion of the purpose of Section 96(2) of the Land Act. I may speculate here. Perhaps one may think that the Redemption Notice under the Auctioneers Act is sufficient because; it comes after the Statutory Notice; it is for 45 days which is more than the 40 days under Section 96(2) of the Land Act; serves the purpose of giving an opportunity to the Chargor to redeem the property; and notifies the Chargor of impending sale of the property if the sum demanded is not paid within the period of 45 days provided in the Notice. But I should state that the requirements under Section 96(2) of the Land Act are mandatory and quite separate from the requirements under the Auctioneers Act. The Redemption Notice under the Auctioneers Act is also mandatory but it is issued separately from and after the one under Section 96(2) of the Land Act; strictly in that sequence.”**

23. The upshot of the above analysis is that in the absence of a Notice to sell under Section 96 (2) of the Land Act, the Statutory Power of Sale will not have legally accrued even if a redemption notice has been issued.

24. Back to the case at hand, it is trite that The Equity of redemption is extinguished at the fall of the hammer. See *Kamulu Academy Limited & another v British American Insurance (K) Limited & 2 others [2018] eKLR*. This is the essence of **Section 99 of the Land Act**. It provides:

**“(1) This section applies to—**

- (a) A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or**
- (b) A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.**

**(2) A person to whom this section applies—**

- (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;**
- (b) Is not obliged to see to the application of the purchase price;**
- (c) Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.**

**(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.**

**(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”**

25. The above provision protects a purchaser of land at the fall of the hammer. In the case of *Mbuthia Vs Jimba Credit Finance Corporation and another [1986-1989] 1 EA 340 (CAK)*, the court considered the impact of an auction sale on the equity of redemption. The charged property in this case had been sold by public auction to the second respondent. The Court of Appeal held: -

**“A sale destroys the equity of redemption in the mortgaged property and constitutes the mortgagee’s exercising the power of sale as a trustee of the surplus proceeds of sale, if any, for the persons interested according to priorities.**

**The Court will not grant to a mortgagor tampering the moneys due under the mortgage, an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of this power of sale unless it is proved that the mortgagee entered into the contract in bad faith. [Emphasis Added.]**

The transaction which is the subject of the dispute was entered into in February 1982 and is therefore governed not only by the Registered Land Act itself, but also by the common law and equity under section 72(1) of that Act, the equity of redemption subsisted in the mortgagor until the leasehold premises was sold. It was then extinguished and the Act provides that "a chargee shall be deemed to have been sold when a bid has been accepted at the auction sale."

26. This means that the mortgagor's right of redemption is lost as soon as the mortgage either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property.

27. Similarly, in *Ze Yu vs Yang Nova Industrial Product Ltd [2003] 1 EA 362 (CCK)*, Justice Nyamu (as he then was) held as follows: -

**"The existence of a valid sale agreement extinguished the equity of redemption and the Applicant had no remedies touching on the property both as against the former mortgagee and against the person exercising the power. *Mbuthia Vs Jimba Credit Corporation [1986] LLR 3292 (CAK)*, *Grant Vs Kenya Commercial Finance Company Limited civil appeal number 227 of 1995* and *Central Bank Kenya Limited Vs Trust Bank and others [1996] LLR 472 (CAK)* applied."**

28. In similar vein, Justice J.B. Havelock had this to say about Section 99 and the position of a purchaser in *Simon Njoroge Mburu vs Consolidated Bank of Kenya Ltd [2014] eKLR*:

**"That section [99] now statutorily encompasses the right of the charger prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the Plaintiff's remedy lies in this case. In this regard, the Plaintiff would do well to note the powers of the Court in respect of remedies and reliefs set out in under section 104 of the Land Act, 2012...."**

**What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished. The only remedy for the charger who is dissatisfied with the conduct of the sale is to file suit for general or special damages..."**

29. In the instant case, it is clear that the plaintiff was issued with injunctive reliefs on the 1<sup>st</sup> of October 2012 pending the issuance of fresh and valid statutory notice followed with a compliant Notification of Sale. This can be gleaned from annexure OK1 to the respondent's replying affidavit, being an order by Hon. A Mshila. In response to the above order, the respondent vide a statutory notice dated the 2<sup>nd</sup> of April 2012 issued fresh statutory notice and proceeded to conduct a successful auction on the 4<sup>th</sup> of October 2012 where the 3<sup>rd</sup> proposed defendant emerged the highest bidder at Kshs 4,900,000 and executed transfer in favour of the 3<sup>rd</sup> proposed defendant.

30. Subsequently, the respondent made an application to court dated the 22<sup>nd</sup> of July 2014 seeking earlier orders registered on the 30<sup>th</sup> of March 2012 against the suit land be deregistered to enable the respondent generate title deed in favour of the 3<sup>rd</sup> proposed defendant. On the 26<sup>th</sup> of July 2018, the court allowed the application by the respondent and directed the land registrar to deregister the court order that has been registered on the 30<sup>th</sup> of March 2012.

31. In view of the above, it is my finding that the auction of 4<sup>th</sup> October 2012 and the subsequent decision of court issued on the 26<sup>th</sup> of July 2018 deregistering the earlier court order registered on the 30<sup>th</sup> of March 2012 by the Land Registrar against the suit property, extinguished the plaintiff/applicant's proprietary interest in the suit property. That is, ownership and subsequent proprietary interest moved from the applicant/plaintiff to the 3<sup>rd</sup> proposed defendant. The 3<sup>rd</sup> proposed defendant became the legal owner of the suit property.

32. The applicant therefore cannot lay any proprietary claim to the suit property as he stopped having the same at the fall of the hammer on the 4<sup>th</sup> of October 2012. This is because, the plaintiff/applicant understood, correctly so, the risk that existed for failure to discharge his obligations under the loan agreement with the respondent. In this regard, I am guided by the holding of Warsame J in *Maltex Commercial Supplies Limited & another vs Euro Bank Limited (in liquidation) [2007] eKLR*, wherein he observed that:

**"In my view any property whether it is matrimonial home or spiritual house, which is offered as a security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured."**

33. I therefore do not see any reason as to why the court would warrant any further occupation of the suit property by the plaintiff/applicant considering that it has been more than 9 years since the 3<sup>rd</sup> proposed defendant acquired interest in the suit land. To allow the applicant/plaintiff to extend his occupation in the suit property would be to prejudice and disadvantage the legitimate and legal owner of the suit property being the 3<sup>rd</sup> proposed defendant together with the respondent. The two stand to suffer greater prejudice if an injunction is granted as opposed to the plaintiff/applicant who brought this fate upon himself when he failed to honor his contract obligation and repay the loan owed to the respondent.

34. In the circumstance, it is my finding that the application dated 13<sup>th</sup> April 2021 lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17<sup>th</sup> DAY OF FEBRUARY, 2022.

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

**1. Mr Keter for Wambua for the applicant**

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